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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 965

ANTONIO MARQUÉS-ARBONA,
PETITIONER,

v.

SECRETARY OF THE TREASURY
OF PUERTO RICO,
RESPONDENT.

PETITION FOR CERTIORARI

(Judgment of the Supreme Court of Puerto Rico, dated February 26, 1962.)

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Now comes your petitioner, Antonio Marques-Arbona, through his undersigned counsel, and respectfully prays this Hon. Court that a writ of certiorari be issued to review the judgment of the Supreme Court of Puerto Rico entered on February 26, 1962, in the above-captioned case, reversing the judgment entered by the Superior Court of Puerto Rico, San Juan Part, on January 19, 1959.

This petition raises for decision the following question of law:

Could the Secretary of the Treasury of Puerto Rico, under § 60(a) of the Income Tax Act of 1924, as amended by Act No. 31 of 1941 (13 L.P.R.A. § 778) revise and assess deficiencies on the basis of fiscal years with regard to a taxpayer who in good faith and with the consent of that officer filed his returns and paid his taxes on the basis of calendar years?

Opinions Below

The opinion of the Superior Court of Puerto Rico, San Juan Part, entered on December 22, 1958, is printed as Appendix A hereto [1] (pp. 66-81).

The opinion of the Supreme Court of Puerto Rico rendered on February 26, 1962, is printed as Appendix B hereto (pp. 112-120).

Jurisdiction

The judgment of the Superior Court is dated January 19, 1959, and is printed as Appendix C hereto (p. 90).

The judgment of the Supreme Court of Puerto Rico reversing the judgment of the Superior Court, San Juan Part, is dated and was entered on February 26, 1962, and is printed as Appendix D hereto (p. 120).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1258.

Petitioner seeks certiorari to the Supreme Court of the United States because the Supreme Court of Puerto Rico committed error:

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[1] The original opinions are in Spanish, as are all other papers in this action; the appended opinions are the translations into English duly certified by the Secretary of the Supreme Court of Puerto Rico.

[2] All numerical references herein are to the pages of such typewritten translations.

First: In deciding that the Secretary of the Treasury, respondent herein, was authorized to extend the period of prescription to 6 months corresponding to years that were not included in the waiver of prescription in order to assess a deficiency on the basis of fiscal years, notwithstanding that from an investigation conducted by the Secretary of the Treasury during the year 1947, in connection with the years 1943-47, the latter knew how petitioner filed his returns.

Second: That the Secretary of the Treasury, respondent herein, was authorized to charge the taxpayer with a delay and to order him to pay fines, surcharges, and interest for his failure to file the returns to September 15 of each year, notwithstanding that the date on which the taxpayer filed his returns was due to the change made by said officer from calendar to fiscal years, with retroactive effect.

Third: In holding that the taxpayer, petitioner herein, had induced the Secretary of the Treasury, respondent herein, to an error in filing his returns on the basis of calendar years when, on the contrary, the taxpayer, petitioner herein, after the investigation made by the Secretary of the Treasury, respondent herein, in the year 1947, and after the latter had accepted his system of filing returns on the basis of calendar years, was induced to follow the same system by the Secretary of the Treasury himself, respondent herein.

Fourth: It erred in deciding and holding that the Secretary of the Treasury was authorized to assess and impose deficiencies in connection with the years 1943, 1945, and 1946, which are calendar years, and at the same time granting respondent's contention to the effect that the taxpayer's years were fiscal years.

Fifth: It erred in including the second semester of the year 1942, notwithstanding that in connection with that year or any part thereof petitioner had not signed any

waiver of prescription nor had he been notified that it would be investigated.

Sixth: It erred in including the first and second semesters of the year 1944, notwithstanding that both the Superior Court and the Supreme Court of Puerto Rico accept that said year had definitively prescribed, wherefore respondent is barred from assessing and imposing deficiencies on the basis of the fiscal years 1943-44 and 1944-45, inasmuch as they include periods of a year that has totally and definitively prescribed.

Seventh: Likewise and in the same manner the Supreme Court erred in holding that the Secretary of the Treasury was authorized to assess a deficiency to be paid by petitioner for the year 1946-47, notwithstanding that neither that court nor the trial court included the year 1947 in their judgments, to which respondent consented, for which reason that year is not included in this action.

Statutes Involved

The statutes pertinent to this petition for certiorari are:

Act No. 74 of 1924, as amended by
Act No. 31 of 1941 (13 L.P.R.A. § 778).

Statement of the Case

The Secretary of the Treasury, respondent herein, served plaintiff, petitioner herein, with income-tax deficiencies in connection with the years 1943 to 1946, both inclusive, which were judicially challenged by means of the instant action. The complaint was filed on September 15, 1954, and on March 28, 1955, plaintiff, petitioner herein, filed certain supplemental allegations. Among other things, he alleged that the years 1943, 1944, 1945, and 1946, had prescribed.

On June 3, 1955, a hearing was held during which evidence was heard and briefs were filed. Thereafter the Superior Court, San Juan Part, through the judge delivering the opinion, dismissed the issue of prescription by an order dated November 21, 1955. Plaintiff, petitioner herein, then filed a motion for reconsideration on December 1, 1955. A hearing was held once again considering the merits of the case, and by an order dated January 18, 1956, the court denied reconsideration and set the case to be heard on the merits on April 12, 1956.

On February 20, 1956, the Superior Court stayed all further proceedings in the case, on the ground that a petition for certiorari had been filed before the Honorable Supreme Court of Puerto Rico on February 16, 1956. The Supreme Court refused to issue the writ on November 24, 1956. On November 28, 1956, plaintiff, petitioner herein, filed a motion to amend the allegations of the complaint, and again reproduced the issue of prescription previously raised and dismissed.

On August 29, 1958, the case was called to be heard on the merits and the parties announced their intention to submit it by a stipulation of facts.

On September 3, 1958, the aforesaid stipulation was filed, admitting the following facts:

(a) That from the beginning and until the year 1948, plaintiff, petitioner herein, filed his returns on the basis of calendar years ending on December 31.

(b) That in the year 1947, the Secretary of the Treasury, respondent herein, conducted an investigation of previous years, (1943-47) and accepted the taxable year chosen by the taxpayer on the basis of calendar years.

(c) That the years 1942, 1944, and 1947 have definitively prescribed because (1) there was no investigation or waiver of prescription in connection with the year 1942, (2) there was no waiver of prescription in connection with the year

1944, and (3) the year 1947 is not included in the judgment rendered in this case.

(d) That in the year 1953 the Secretary of the Treasury of Puerto Rico, respondent herein, asked plaintiff, petitioner herein, for a written waiver of the period of prescription in connection with the years 1943, 1944, 1945, 1946, and 1947, and to that effect he used the official forms of his Department, setting forth in the blank space corresponding to the taxable year that the waiver of prescription referred to years ending on December 31.

(e) That plaintiff complied with the request of the Secretary of the Treasury and signed the waivers as prepared by that officer—except as to the year 1944 in connection with which no waiver was executed—thereby consenting to extend for one year the latter's authority to investigate his operations and books during the other years above mentioned.

(f) That as a result of the investigation conducted by the Secretary of the Treasury, respondent herein, that officer produced and served plaintiff, petitioner herein, with deficiencies for each of the aforesaid years, but on the basis of fiscal years, that is: 1942-43, 1943-44, 1944-45, 1945-46, 1946-47.

(g) That despite the fact that the waivers expressly referred to years ending on December 31, just as plaintiff had been doing in his income-tax returns and of which the Secretary of the Treasury, respondent herein, had been aware since 1947; the latter assessed those deficiencies on the basis of years ending on June 30, contrary to the terms of the waivers executed between the parties.

(h) That in determining, as defendant did determine, that after executing the waivers plaintiff had to file his returns on the basis of fiscal years and not on the basis of calendar years, as had been his custom, the former

ordered him to pay penalties for each one of the years involved (1943, 1944, 1945, 1946, and 1947).

(i) That likewise, to compute the interest imposed on the plaintiff, defendant utilized September 15 as a basis instead of March 15 as should be the case in connection with any return filed to December 31.

(j) That the waiver of prescription executed by plaintiff and defendant for the year 1943, literally reads thus:

"Form 482.1 1-25-55

"Department of the Treasury

"Income Tax Bureau

"San Juan (Santurce), Puerto Rico

"Consent Waiving Period of Prescription and Fixing Time Limit for Income Tax Assessment

"In San Juan, P. R., on this day of the Month of *December* 1943; taxpayer , as party of the first part, in his own right or by his duly authorized representative, , and the Secretary of the Treasury of Puerto Rico, as party of the other part, do hereby stipulate and agree as follows:

"That pursuant to the provisions of the Income Tax Act in force, the taxpayer herein, in his own right or by his representative, hereby waives for all legal purposes the seven (7)-year period of limitation provided by 60a(1) of the Act, with respect to his income-tax return for the taxable year ending *December 31, 1943*; it being agreed that any income-tax deficiency determined under the act in force or under prior laws, in connection with the aforesaid income-tax return, may be assessed on any date on or before *December 31, 1954*.

"It is further agreed that the date hereinabove set forth for the assessment of any tax deficiency shall be extended for a period of thirty (30) days if the taxpayer (or his duly

authorized representative) is served with notice of an income-tax deficiency pursuant to subdivision (a) of § 57 and fails to take an appeal to the Tax Court of Puerto Rico; and in the event an appeal has been taken, said period shall then be extended for ninety (90) days after the final decision of the court.

Taxpayer

By:

Authorized Representative

Secretary of the Treasury

By:

Date

"This consent may be signed by the taxpayer's representative or agent provided such action is authorized under a power of attorney which, if not previously filed of record, must be attached hereto.

"If this consent is signed by a corporation, it shall be signed with the corporate name, followed by the signature and title of the officer or officers of the corporation authorized to sign on its behalf, and the corporate seal shall also be affixed."

On December 22, 1958, the Superior Court, San Juan Part, entered judgment reconsidering the issue of prescription raised by plaintiff, petitioner herein. That issue was granted as to the years 1943, 1945, and 1946, and dismissed as to the year 1947.

On January 14, 1959, plaintiff, petitioner herein, moved for the amendment of the judgment on the ground that it omitted the finding that the year 1944 had also prescribed for the reason that no waiver of prescription had been

executed in connection with that year, which fact was set forth and established in the opinion of the trial court. On January 26, 1959, a copy of the amended judgment was filed of record, as requested by plaintiff, petitioner herein.

When defendant, respondent herein, filed his computations, plaintiff, petitioner herein, objected thereto, among other reasons, because of the collection of the sum of $8,739.16 as a penalty for the untimely filing of his return during the year 1947. On April 2, 1959, an order amending once more the judgment in the sense of eliminating the penalty for filing the return untimely, was filed of record.

On April 29, 1959, defendant, respondent herein, filed a petition for certiorari to review the judgment of the Superior Court, San Juan Part, and thereafter the Honorable Supreme Court of Puerto Rico rendered the judgment involved in this petition for certiorari.

Reasons for Granting the Writ

There is no doubt that when Congress adopted Section 1258 of the United States Code its intent was to place Puerto Rico on the same equal footing as are the other states of the Union insofar as federal review is concerned. By no means Congress had in mind that in the federal appellate system, the Puerto Rico Supreme Court say the last word in connection with all the litigation reaching said Court.

In deciding this case, the Supreme Court of Puerto Rico relied exclusively on the fact that the change made by the Secretary of the Treasury, respondent herein, substituting with a fiscal year the calendar year on the basis of which the taxpayer, petitioner herein, filed his returns, did not modify the situation of fact, inasmuch as the petitioner carried his books on the basis of fiscal years and therefore suffered no harm.

Such finding by the Supreme Court of Puerto Rico is erroneous as we shall prove during our discussion of the errors assigned and argued below.

Was the Secretary of the Treasury, respondent herein, authorized to extend the period of prescription to months corresponding to years that were not included in the waiver of prescription?

The waiver of prescription, as litegally copied in the Statement of Facts, is an official form of the Department of the Treasury of Puerto Rico, and the date "December 31" of each of the years involved was inserted by the Secretary of the Treasury, respondent herein, in order to show petitioner's taxable year, such as it appears from each and every one of the years involved herein.

After the investigation of the years involved herein, and after the Secretary of the Treasury had concluded that the petitioner had been filing his income-tax returns erroneously, on the basis of calendar instead of fiscal years, a disclosed by his accounting system, the Secretary of the Treasury assessed tax deficiencies for those years, changing the system and thereby utilizing months pertaining to other years, not included in the calendar year for which the petitioner had signed the waiver of prescription previously referred to.

Under such circumstances, and in considering the year 1943, he divided it into two periods: the first, 1942-43, and the second, 1943-44. Inasmuch as neither the year 1942, nor any part thereof, was involved in the investigation authorized by the petitioner in his waiver of prescription for that year, the second semester of the year 1942 had prescribed by express provision of § 60, subdivision (a) of Act No. 74, approved August 6, 1925, as amended by Act No. 31, approved April 12, 1941 (13 L.P.R.A. § 778) providing that "The amount of income and excess-profits and the amount of income taxes imposed by this Act, as

amended, shall be assessed within seven (7) years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period."

In the year 1953, the Secretary of the Treasury requested from the petitioner a waiver of prescription in the manner set forth above for which reason, since no waiver of prescription was executed for the year 1942, that year had definitively prescribed to all legal effects.

The petitioner signed no waiver of prescription for the year 1944, which fact was admitted by the respondent, for which reason that year has definitively prescribed.

The same thing that occurred with the year 1943, occurred with the calendar years 1944 and 1945, which years were divided into 1943-44 and 1944-45, in order for the Secretary of the Treasury, respondent herein, to make two fiscal out of those calendar years.

Under these circumstances there are two issues: (1) Could the Secretary of the Treasury, respondent herein, change petitioner's system of filing his returns to December 31 and notify him with a deficiency on the basis of a different year, in violation of the period specified in the waiver of prescription authorizing him to investigate only petitioner's calendar years? And (2), Could the Secretary of the Treasury, respondent herein, utilize semesters corresponding to years that had definitively prescribed in order to compose therewith a fiscal year and assess a deficiency; as well as interest, surcharges, and fines for a delay in filing the return, when such delay was caused by the change made from calendar to fiscal years by the respondent in connection with the petitioner?

This same situation arose in *Mabel Elevator Co.*, 2 B.T.A. 517, in which, and deciding facts similar to those involved herein, that Board stated:

"(1) It appears that on August 12, 1921, taxpayer filed what purported to be an amended return for the period from August 1, 1917, to July 31, 1918. It has already been held by this Board that the filing of an amended return does not toll the period of limitations set out in section 277(a) (2) of the Revenue Act of 1924. *Appeal of National Refining Co. of Ohio*, 1 B.T.A. 236.

"(2) It is urged that since the return filed by the taxpayer was made upon a fiscal year basis, while the law required a return upon a calendar year basis, the return filed was not the return required by the law and could not operate to start running the statutory period of limitations. With this we can not agree. The return filed purported to be made in accordance with the law; it purported to and did include the income of the taxpayer for the period in question. In the absence of any evidence or claim that such return was false or fraudulent with intent to evade tax, it became the duty of the Commissioner to determine, within the time provided by law, whether or not such return was erroneous in any respect.

"There can be no doubt that such limitations are placed on assessments for the purpose of assuring the taxpayer who has made an honest return, that after such period his tax liability will not be reopened; otherwise the business of the country would always have before it the threat of additional taxes against the income of years long past whenever a new theory for interpreting the tax law or for the application of accounting principles occurred to the taxing authorities. If the limitation can be avoided on the plea that the return filed was not such a return as is required by law, although filed in good faith, there is no such assurance for the taxpayer and the limitation becomes

of doubtful value at least. If the statute requires any interpretation great weight must be given to the purpose which it was obviously intended to accomplish."

The foregoing decision of the U. S. Board of Tax Appeals was subsequently ratified, cited with approval, on April 22, 1929, in *Leasing & Building Co. v. Commissioner of Internal Revenue*, 16 B.T.A. 105, in which the Board set forth as follows:

"The consent in question provides for an extension of the period prescribed by law for the determination, assessment, and collection of the amount of income and profits taxes 'due under any return made by or on behalf of said taxpayer for the year 1919.' Both of the parties hereto lay great stress upon the meaning of the expression 'the year 1919,' the Commissioner contending, on the one hand, that in view of the circumstances herein, it means the fiscal year 1919, and the petitioner contending that, since return for 1919 was made on the calendar year basis, it can only relate to the calendar year 1919.

"The controversy, therefore, is narrowed to the question whether the written consent operated to give the Commissioner the right to determine, assess, and collect any deficiency in respect of petitioner's income for 1918. The statute of limitations in respect of the determination, assessment, and collection of any tax for the calendar year 1918 *began to run upon the filing of the return for 1918*, or June 12, 1919, *notwithstanding such return was upon an erroneous basis*. *Mabel Elevator Co.*, 2 B.T.A. 917. The five-year period of limitation relating to the year 1918, therefore, expired June 12, 1924, more than five months before the date of the Commissioner's letters and the execution of the consent in question." (Italics ours)

The preceding decision of the U. S. Board of Tax Appeals was affirmed by the Circuit Court, 46 F.2d 2. *Comm. v. Leasing & Building Co.*

The Supreme Court of Puerto Rico rested principally on the theory that since the petitioner's system of accounting was based on fiscal years, the respondent was authorized to change the terms of the waiver prepared by him, on the ground that the change did no harm to the taxpayer, petitioner herein, notwithstanding that on account of that change he was ordered to pay fines, surcharges, and interest because a delay as to the date of filing his returns, of March 15 on the basis of calendar years, to September 15 on the basis of fiscal years, had been artificially created. It is of no consequence whether or not the system utilized by petitioner is correct (*Leasing & Building Co., supra*). The prescriptive term begins and goes back to the date on which the taxpayer filed his return and the investigation and, if proper, the change in the manner of filing his returns, the Secretary of the Treasury could and was bound to do so, but within the period granted him by law, to wit, seven years in this case.

The Supreme Court of Puerto Rico also relies on the erroneous fact that the taxpayer, petitioner herein, induced the Secretary of the Treasury, respondent herein, to an error in filing his returns on a basis different from the basis of his accounting system, when it is an accepted and admitted fact that such state of affairs had been perfectly known to the Secretary of the Treasury since 1947, on which date the latter made an investigation of the petitioner's books, without informing him that his system was erroneous until the year 1953.

As soon as the Secretary of the Treasury ordered the petitioner to change his system from calendar to fiscal years, petitioner has done so, and he would have done as

much since 1947, had the Secretary of the Treasury, respondent herein, given him the same order on that date.

Reconsideration

Petitioner moved for reconsideration of the judgment rendered by the Supreme Court of Puerto Rico briefly stating before that Court the same statements we have made before this Honorable Court. The Supreme Court of Puerto Rico denied reconsideration notwithstanding that we stressed the fact that for the reason that the complaint had been granted in connection with the calendar years 1943, 1945, and 1946, when the Secretary of the Treasury executed that judgment, he would be met with the difficulty of having to utilize semesters of calendar years that had prescribed, such as 1942 and 1944, in order to make fiscal years of the calendar years 1942, 1943, 1944, and 1945.

Conclusion

For the reasons stated above your petitioner, Antonio Marques-Arbona, prays this Hon. Supreme Court of the United States to grant this petition for certiorari to the Supreme Court of Puerto Rico.

San Juan, Puerto Rico, May 7, 1962.

Respectfully submitted,

SANTOS P. AMADEO

Copies of this Petition
and of the Record on Appeal
served on the Hon. J. B.
Fernandez-Badillo, on this
7th day of May, 1962.

SANTOS P. AMADEO

Appendix A

STATEMENT OF THE CASE, OPINION, AND JUDGMENT

On August 17, 1954, defendant notified plaintiff with an income-tax deficiency for the taxable years 1943, 1944, 1945, 1946, 1947, and 1948, amounting to $182,890.16.

This was the amount arrived at after an administrative hearing granted plaintiff by defendant, held in the Income Tax Bureau of the Department of the Treasury.

Disagreeing with defendant's final decision, on September 15, 1954, plaintiff appealed.

On December 10 of that same year defendant answered the Complaint.

On March 28, 1955, plaintiff filed certain allegations of fact and of law to supplement the allegations of the Complaint and these were answered by defendant on March 31 of that same year.

Under Special Allegations, plaintiff raised the defense of prescription in connection with the years 1943, 1944, 1945, 1946, and 1947.

By stipulation of the parties, the question of prescription raised by plaintiff in connection with those years was submitted by memoranda to the consideration of the Hon. Carlos Santana-Becerra, former Superior Judge of this Part, now an Associate Justice of the Supreme Court of Puerto Rico, and on November 21, 1955 it was decided against plaintiff and later upheld on reconsideration by an Order of November 18, 1956.

On September 3, 1958, the parties submitted a stipulation of facts, without prejudice to the questions of law being submitted to the consideration of this Court by way of reconsideration. They agreed as to the following facts:

"YEAR 1942-43

(a) Depreciation "Santana" Inventory — $441.00

Plaintiff accepts rejection of this item.

(b) Shack—$882.90

(c) Perforating Machine—$240.57

(d) Well and Pipes—$320.96

With respect to these items defendant grants depreciation as follows:

(1) 5% of $882.90	$44.15
(2) 10% of $240.57	24.05
(3) 5% of $320.96	16.05
Total	$84.25

(e) Profit "Buen Retiro Farm"—$61,137.76

Defendant grants the amount of $5,276.16 as deferred expenses.

(f) Pyramid Co. Commission $125.00

Plaintiff accepts rejection of this item by defendant.

(g) Deferred Expenses 1943-44 Grinding Season $3,318.90

Both parties accept that this item be accepted on the basis of the year in which the expenses were actually paid, to wit, the year 1942-43, and that the amount of $4,347.95 be deducted in like concept in the year 1941-42. That item corresponds to the year 1941-42 and was granted as a deduction in the year 1942-43.

(h) Bad Debts $274.81

Plaintiff accepts defendant's rejection of this item.

YEAR 1943-44

Both parties accept that for this year the amount of $16,967.65 must be deducted from the income as cultivating expenses incurred from July 1, 1943 until January 14, 1944.

Deferred expenses $3,318.90. Plaintiff accepts rejection of this item.

YEAR 1944-45

(a) Deferred Expenses (year 1944-45)—$2,939.68

(b) Deferred Expenses (year 1943-44)—$4,481.06

Both items are granted for the years in which they were paid, that is, the item set forth in subdivision (a), for the year 1944-45, and the item set forth in subdivision (b), for the year 1943-44.

(c) Profit "San Isidro" Farm—$1,200.00

Plaintiff accepts rejection of this item and defendant grants the sum of $240.00 as depreciation.

(d) Pyramid Co. Commission—$120.00

Plaintiff accepts rejection of this item.

(e) Profit on Sale of Property—$1,252.30

Plaintiff accepts this item.

(f) Farming Tools—$3,408.85

Plaintiff accepts that he claimed in excess the amount of $2,247.09 as depreciation, which must be added to the income.

YEAR 1945-46

(a) Pyramid Co. Commission—$441.55

Plaintiff accepts rejection of this item.

(b) Profit on Sale of Property—$2,252.96

Defendant accepts that plaintiff obtained an additional profit of $1,350.00 from the sale of this property instead of $2,252.96 he had charged.

(c) "East Coast" Loss—$8,881.36

Plaintiff accepts rejection of this item.

(d) Deferred Expenses (year 1945-46)—$5,464.54

(e) Deferred Expenses (year 1944-45)—$2,939.68

Both parties stipulate that the amounts referred to in the preceding subdivisions (d) and (e) be deducted from plaintiff's income in the year in which they were paid, to wit, the item set forth in subdivision (d), in the year 1945-46, and the item set forth in subdivision (e), in the year 1944-45.

(f) General Expenses—$1,134.60

Plaintiff accepts rejection of this item.

(g) Farming Tools—$4,734.65

Plaintiff accepts that he claimed in excess the sum of $2,513.69 as depreciation, which amount must be added to his income.

YEAR 1946-47

(a) Expenses "Santana" Farm—$1,352.79

Plaintiff accepts this item.

(b) Deferred expenses (year 1946-47) $6,339.22

(c) Deferred expenses (year 1945-46) —$5,464.54

Both parties accept that these expenses be granted for the year in which they were paid, that is, the amount set forth in subdivision (b), for the year 1946-47, and the amount set forth in subdivision (c), for the year 1945-46.

(d) Depreciation—$4,320.17

Defendant accepts granting the sum of $557.00.

Defendant accepts that plaintiff is entitled to claim the amount of $2,763.76 left unclaimed in the return as depreciation—Farming Tools.

(e) Bad Debts—$343.00

Plaintiff accepts rejection of this item.

(f) Profit on Sale of Cattle—$1,820.62

Plaintiff accepts this item.

(g) Guajataca Expenses—$328.00

Plaintiff accepts rejection of this item.

(h) Gifts—$565.00

Plaintiff accepts rejection of this item.

(i) Profit "Hill Brothers Farm"—$12,781.17

Plaintiff accepts this item.

(j) Iron frame—$200.00

Plaintiff accepts rejection of this item and defendant grants the sum of $20.00 for depreciation in connection with this item.

YEAR 1947-48

(a) Deferred expenses (year 1947-48)—$10,761.79

(b) Deferred expenses (year 1946-47) —$6,339.22

Both parties agree and stipulate that these expenses be imputed to the years in which each one of them was paid, that is, the item corresponding to subdivision (a), for the year 1947-48, and the item corresponding to subdivision (b), for the year 1946-47.

(c) Pyramid Co. Commissions—$162.24

Plaintiff accepts this item.

(d) Depreciation—$5,024.51

Defendant grants $557.00 as depreciation in connection with this item and accepts that plaintiff is entitled to claim the amount of $1,575.40 he did not claim in the return, as depreciation—Farming Tools.

(e) General Expenses—$899.20

Plaintiff accepts rejection of this item.

The additional depreciation granted for the year 1942-43 shall be equally applied to subsequent years covered by the deficiency."

Findings of Fact

The Court finds as follows:

1. That plaintiff filed his returns to end on December 31 notwithstanding that the operations in his books were closed as of June 30.

2. That for the years 1943, 1945, 1946, and 1947, defendant requested and obtained from plaintiff a written waiver of the prescriptive period.

3. That the waiver executed by plaintiff for each of the years involved herein is the official form prepared by defendant's office, that, insofar as pertinent, reads:

> "That pursuant to the provisions of the Income Tax Act in force, the taxpayer herein, in his own right or by his representative, hereby waives for all legal purposes the seven (7)-year period of limitation provided by 60(a)1 of the Act, with respect to his income-tax return for the taxable year ending *December 31, 1943*; it being agreed that any income-tax deficiency deter-

mined under the act in force or under prior laws, in connection with the aforesaid income-tax return, may be assessed on any date on or before *December 31, 1954*."

4. That for the years 1942 and 1944, plaintiff signed no waiver at all in connection with the term of prescription, for which reason those years have definitively prescribed.

5. That the year 1947 is not barred, for the reason that the seven-year prescriptive term extends to March 15, 1955, and the deficiency was notified on August 17, 1954.

6. That subject to the question of law hereinafter considered and decided, each and every one of the facts set forth in the stipulation submitted by the parties on September 3, 1958, are true.

CONCLUSIONS OF LAW

The question of prescription now raised again by way of reconsideration has already been decided against plaintiff by another judge of this Part. The Court, was at first inclined to decide it in the same way and on the same grounds as the Hon. Carlos Santana-Becerra did, but after thoroughly examining both orders of that Judge, as well as the memoranda of the parties and the law and decisions cited and argued therein, it deems that it must consider the scope in law of the waivers executed between plaintiff and defendant to extend the prescriptive term in connection with the years 1943, 1945, and 1946.

Plaintiff's waiver of the prescriptive term for the years in question deprive him of a right, to wit, that defendant, within the seven-year period from the date plaintiff filed his income-tax return as provided by 69a(1) of the law, could assess any income-tax deficiency resulting under the law in force.

By virtue of those waivers defendant had an additional year to engage in the corresponding investigation and to act accordingly.

Every waiver of a right must be restrictively construed against the draftsman.

> "Ambiguities in documents are construed against the draftsman even though the draftsman is the government of the United States, acting through the Internal Revenue Department . . . It has been held that the Courts cannot reform the instrument, *although both parties intended something else.*" (Italics ours) Mertens, Vol. 10, §57.56, p. 235-6.

Plaintiff filed his returns to end on December 31, notwithstanding that the operations on his books were closed as of June 30.

Let us find out how this situation is affected by the terms of the waivers executed by plaintiff.

Defendant sent plaintiff, for his signature, five official forms of waivers (Form 482.1), one for each year involved herein. In all of them defendant typed December 31 of each year as plaintiff's taxable year, and December 31, 1954 as the expiration date of the extension granted by plaintiff for the assessment of the proper income-tax deficiency.

Regardless of whether or not defendant knew how plaintiff filed his income-tax returns for the years involved herein,[1] he was bound to specify the year he intended to investigate and he did thus.

We do not doubt in the least that defendant is not authorized to modify the terms of a waiver, even though the taxpayer is not harmed thereby or the intention is to adjust to the facts.

---

[1] In this case not only was he aware of the manner in which plaintiff filed his income-tax returns, but in the year 1948 he wrote plaintiff a letter (Plaintiff's Exhibit V) saying in part as follows: "You are also informed that in order to avoid *in the future* the administrative penalty imposed by § 77(a) of the Income Tax Act, all returns must be filed on the date indicated in the first paragraph hereof." (Italics ours) The first paragraph of that letter indicates "September 15," which corresponded to the fiscal year ending June 30, 1948. Since that date plaintiff has been filing his tax returns on the basis of fiscal years.

Through the mere running of time rights are acquired or lost. Such is prescription.

Prescription does not contemplate whether a right is clear, doubtful or obscure to impose its principle. The expiration of a fixed statutory term is enough to extinguish the clearest right in law.

When a right is waived, courts can not change the text of a written waiver, although it be claimed that the parties intended something else.

> "It has been held that the Courts cannot reform the instrument [waiver], although both parties intended something else."
>
> (Matter in brackets ours) 10 Mertens, *supra*.

Defendant knew that prior to the year 1948 plaintiff filed his income-tax returns to end on December 31 and he also knew that this notwithstanding his operations were closed in his books as of June 30. (Plaintiff's Exhibit V) nevertheless, when drafting the waivers, defendant set forth the same late utilized by plaintiff in his returns, but when notifying him with the deficiency he ignored this fact and fixed a different taxable year, that is, a fiscal year.

Plaintiff's income-tax returns were consistently filed to comply with his tax duty, on the basis of calendar years, that is, years ending December 31.

Inasmuch as the tax return is the basis of the controversy in this case, we are forced to conclude that if anything had to be amended, corrected, or changed, it was not the return as such, nor the taxable year included therein, but rather the contents or basis of the return. In other words, what defendant could perhaps have done was to separate plaintiff's fiscal years that had not prescribed, each one of which, as has been proved, consisted of a twelve-month period beginning July 1 of one year and ending June 30 of the following year, in such a way that, for ex-

ample, taking the second semester of the year 1942-43 if 1942 had not prescribed, that is, from January 1 to June 30 of said year, and adding the results of the first semester of the year 1943-44 rendered by plaintiff in his return for the year 1944 (to December 31 of that year), it gave a twelve-month period beginning January 1 and ending December 31, 1943, and so on in each and every one of the years involved herein. However, what defendant did was to depart from the agreement established through the waiver, thereby annulling the legal effects of the return filed by plaintiff to March 15, 1944 for the preceding year 1943, as he had been doing for many years.

By means of this procedure—erroneous, in our judgment, and inconsistent with the scope of the waiver—defendant established a basis to impose fines and collect interest that otherwise plaintiff herein would not have owed.

This is so because when obtaining the waiver, defendant did it expressly on the basis of a taxable year ending December 31, that is, a calendar year. The result would have been different had defendant obtained a waiver on the basis of a taxable year ending June 30, which he could have done and did not do.

The taxpayer signed an instrument waiving the period of prescription enabling defendant to have enough time to investigate the operations of his business and to assess the corresponding income-tax deficiency, on the basis of calendar years, just as this investigation in the year 1948 was done for the first time.

Plaintiff was entitled to expect that his operations in the books, although not corresponding to the taxable year he had chosen, would be adjusted in such a way that the income reflected the calendar year without having his taxable year changed.

Pursuant to the waivers executed by both parties to cover the years involved herein, defendant was bound to make

the corresponding investigation on the basis of years ending December 31, which was plaintiff's basis.

When defendant changed the taxable year set forth by him in each one of the waivers that by agreement he had signed with plaintiff, he violated unilaterally those instruments and broadened the scope of his investigations beyond the years authorized by the waivers, such as the calendar years 1942 and 1944, without plaintiff's consent.

In accordance with the provisions of each one of the waivers, defendant could have adjusted plaintiff's operations in order to cover the twelve-month period of the calendar years involved on the basis of the written agreement. However, he did not do so and adopted a procedure that is obviously contrary to the law and the decisions.

> "... it has been held that a waiver of the assessment and collection of taxes due under a return made for a specific calendar year applies to that calendar year or, if the taxpayer is on the fiscal year basis, to the fiscal year ending in the calendar year named in the waiver. On the other hand, where a taxpayer filed calendar year returns and the Commissioner determined that fiscal year returns should have been filed, it was held that a consent to later assessment and collection of taxes 'due under any return made by or on behalf of said taxpayer for the year 1919' applied only to returns filed for the calendar year 1919, and did not extend the period of limitation as to the fiscal year ending in 1919, which included several months in 1918."
>
> *Ventura Consolidated Oil Fields* v. *Rogan*, 86 F.2d 149. *Comm.* v. *Leasing & Building Co.*, 46 F.2d 2. 10 Mertens, §57.56, p. 236

Now, even assuming that defendant's contention were valid, undoubtedly the second semester of the calendar year 1942, that is part of the fiscal year 1942-43, has pre-

scribed, in the same way that the second semester of the year 1943-44 and the first semester of the year 1944-45 have prescribed, inasmuch as the calendar years 1942 and 1944 have prescribed for lack of waivers, which fact has been recognized by defendant in the first instance.

Such being the facts, defendant has no authority to assess a deficiency on part of a fiscal year that has prescribed, whereby he is barred from assessing a deficiency of any kind for the fiscal years 1942-43, 1943-44, and 1944-45.

It must be concluded that consistent with the facts, the applicable law and decisions, the years 1942-43, 1943-44, 1944-45, and 1945-46 have prescribed.

The stipulation submitted by the parties on September 3, 1958, regarding the year 1947-48, is hereby granted.

Judgment will be entered accordingly.

Appendix B

Division composed by Mr. Justice Perez Pimentel, as Chief Judge of Division, Mr. Justice Rigau and Mr. Justice Davila.

Opinion of the Court delivered by Mr. Justice Davila San Juan, Puerto Rico, February 26, 1962

The judge of the trial court concluded that certain deficiencies notified to Antonio Marques Arbona were barred. The Secretary of the Treasury comes to us for review.

The taxpayer, in determining his taxable income, utilized a twelve-month period beginning July 1 and ending June 30 of the following fiscal year. This notwithstanding, he filed his returns within the period given taxpayers to file their returns on the basis of calendar years. And in the heading of the return he set forth that it corresponded to the taxable year ending December 31. But, indeed, no income received after June 30 was included in the return.

The taxpayer signed various documents entitled "Consent To Waive the Term of Prescription and To Fix Time for Income Tax Assessment" for the years 1943, 1945, and 1946. They included the following paragraph, identical in every case, except insofar as the date is concerned:

> "That pursuant to the provisions of the Income Tax Act in force, the taxpayer herein, in his own right or by his representative, hereby waives for all legal purposes the seven (7) year period of limitation provided by 160(a)(1) of the Act, with respect to his income tax return for the taxable year ending December 31, 1945; it being agreed that any income tax deficiency determined under the act in force or under prior laws, in connection with the aforesaid income tax return, may be assessed on any date on or before December 31, 1953."

The deficiencies that gave rise to this litigation were notified on August 17, 1954. We have seen that they correspond to the years 1943, 1945, and 1946. Thus, their effectiveness depends on the construction of the waiver embodied in the document executed by the taxpayer, for otherwise they would be barred. Income Tax Act of 1924, §60, 13 U.S.C.A. §778. The taxpayer alleges that said waivers are ineffective since they refer to years ending December 31 and the deficiency notified was determined on the basis of fiscal years ending June 30. He is wrong.

In *Hirambo Manufacturing Co.*, 13 B.T.A. 888 (1928), the waiver executed by the taxpayer referred to the year 1919 and he was notified with a deficiency corresponding to the fiscal year ending November 30, 1919. In deciding the issue it was held:

> "The petitioner contends that the waiver set out in the findings of fact is not an effective waiver for the reason that it is 'for the year 1919' and not for the fiscal year ended November 30, 1919. We fail to see any merit in this contention. The term 'taxable year' is defined in all of the Revenue Acts beginning with the Revenue Act of 1918 as meaning 'the calendar year, or the fiscal year ending during such calendar year.' The term 'year 1919' as used by the parties to the waiver could have referred to no other year than the taxable year 1919 which in this case was the fiscal year ended November 30, 1919. In our opinion the waiver was valid and since it had not expired at the time the deficiency letter was mailed the proposed deficiency is not barred by the statute of limitations."

See §277(b) of the Income Tax Act of 1954.

In *Consumers Ice Co.*, 11 B.T.A. 144 (1928), the waiver referred to the year 1920, while the taxpayer had filed his return in which he established a twelve-month period end-

ing November 30, 1920, to determine his income. In deciding the issue it was held:

> "However, petitioner states that since the instrument executed with regard to taxes for 1920 refers simply to the year 1920, and as it does not designate a 'taxable year' or a 'fiscal year,' it refers only to the calendar year 1920, and that consequently no waiver covers the period December 1, 1919, to December 31, 1919.
>
> "The primary consideration with regard to waivers is the intent of the parties. It is only reasonable to suppose that when the agreement was entered into the parties intended it to cover the taxable year, and since no showing is made to the contrary, we hold that the waiver in question covered the entire taxable year and assessment of the taxes is not barred."

In considering this question Mertens summarizes it thus, and supports his conclusion on the case of *Waramba*, above cited:

> "[. . .] it has been held that a waiver of the assessment and collection of taxes due under a return made for a specific calendar year applies to that calendar year or, if the taxpayer is on the fiscal year basis, to the fiscal year ending in the calendar year named in the waiver." 10 Mertens, 57.56, p. 236

To the same effect, *Lowell Cotton Mills v. Grissom*, 59 F.2d 461 (D.C. M.D. N.C., 1932); *Constitution Publishing Co.*, 22 B.T.A. 426 (1931); *Raymond B. Bill & Co.*, 15 B.T.A. 320 (1929).

In *Spencer K. Mulford, Sr.*, 25 B.T.A. 238 (1932), the taxpayer signed a waiver without specifying the year to which the waiver corresponded. When he was notified with the deficiency, he raised this question to support his claim that it was barred. It was decided against his contention, since the only year in controversy was the year in con-

nection with which the deficiency was notified, and in deciding the issue raised it was said:

> "Where the taxpayer, by the execution of the waiver, has obtained delay in the collection of additional taxes and a more deliberate and thorough consideration of his claim in abatement, and where the waiver is regular in form . . . and is in the possession of the proper governmental bureau, every presumption should be taken in favor of its validity and binding effect."

The judge of the trial court to whom the question was submitted for the first time, in deciding it used terms which adequately dispose of the issue:

> ". . . At first blush plaintiff's contention seems sound, because if a taxpayer executes a waiver of prescription on the basis of a calendar year covering income from January 1 to December 31, and thereafter the Secretary of the Treasury serves plaintiff with a deficiency involving a fiscal year, the deficiency would undoubtedly be based on income partly covering periods beyond the period of income in connection with which prescription was waived. Following plaintiff's argument, he would have authorized the assessment of the tax on income obtained between January 1 and December 31, and the Secretary of the Treasury would be assessing a tax on income partly obtained on a date prior to that January 1.
>
> "But as we examine the evidence, plaintiff's contention vanishes, and everything boils down to a mere question of nomenclature. The evidence showed that the deficiency determined for each year was based on the same period of income included in the return, in accordance with the taxpayer's accounting. Thus, for example, we see that in the year 1943, the first one of the years involved, the deficiency does not cover income obtained between July 1 and December 31 of that

year not included in the return. Nor does the deficiency discard the income declared between July 1 and December 31, 1942, which period falls beyond the 1942 calendar year. The same thing happens with the other years. Hence, the situation which at first blush seems sound, to the effect that on the basis of a waiver of prescription for a taxable period, the Secretary of the Treasury assessed deficiencies including different tax able periods, does not exist.

"The answer as to why the waivers of prescription executed by defendant make reference to years ending December 31, appears from the taxpayer's own actions. Notwithstanding that he had to pay taxes on the basis of a period of income ending June 30, the taxpayer filed his returns as of December 31, although those returns included no operations or income obtained during the six months immediately preceding December 31. If the waivers of prescription the Secretary of the Treasury could not make reference to years ending June 30, because there was no such thing, according to the returns. The important fact is that when the waivers referred to years ending December 31, the taxpayer knew perfectly for which periods of income he was waiving prescription, because it corresponded faithfully to his own method of tax paying and return filing. Thus, when he authorized the defendant to assess on or before December 31, 1954, any income-tax deficiency in connection with the aforesaid income-tax returns [December 31, 1943]; [1945], and [1946], he knew in connection with this income-tax return, and regarding which period of income he was authorizing the assessment. He can not allege that he was misled or deceived by a situation of his own creation."

The waiver executed by the taxpayer can be construed in no other way. If in the returns filed by him he established as the basis to determine his income a twelve-month period ending June 30, when he signed the waiver he could not refer to any period of the year other than the one the taxpayer himself established in his return. Were we to uphold the taxpayer's contention, we would simply be recognizing the fruits of his own error.

It now remains to be considered the question concerning the penalties imposed by the Treasurer for the failure to make the return within the period granted therefor, beginning at the end of the fiscal year utilized by the taxpayer to determine his income. Act No. 74 of 1924, § 27 —13 L.P.R.A. § 706. Pursuant to the provisions of the aforesaid section, the taxpayer was bound to file his return not later than September 15 and he did not file it until the following March 15. Therefore the imposition of the penalties prescribed by law is in order. Act No. 74 of 1924, §§59 and 70 (13 L.P.R.A. §§777(a) and 811(b)).[1]

In view of the conclusion we have reached, we need not consider and pass upon the other error assigned by appellant.

Therefore, the judgment rendered by the Superior Court San Juan Part, on January 19, 1959, shall be reversed and the case shall be remanded for further proceedings.

(s) CARLOS V. DAVILA
Associate Justice

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[1] A similar provision appears in § 291 of the 1954 Income Tax Act 13 L.P.R.A. § 3291 (1957 Cumm. Supp.)

Appendix C

JUDGMENT

The complaint is hereby granted as to the defense of prescription for the years 1943, 1945, and 1946, and it is dismissed as to the year 1947. With respect to the latter year, defendant shall proceed to make the corresponding computations within the statutory period, in accordance with the terms of the stipulation and our findings and conclusions.

Let this Judgment be registered and served.

Given in San Juan, Puerto Rico, December 22, 1958.

(s) LUIS R. POZO
Judge

Served with copy on this
24th day of December 1958.
(s) F. M. SUSONI, JR.

AMENDED JUDGMENT

On the grounds set forth in our findings of fact and conclusions of law dated December 22, 1958, attached to the record of this case and made a part hereof, the Court enters judgment granting the Complaint as to the defense of prescription for the years 1943, 1944, 1945, and 1946, and dismissing it as to the year 1947. With respect to the latter year, defendant shall proceed to make the corresponding computations within the statutory period, in accordance with the terms of the stipulation of the parties.

Let this judgment be registered and served.

San Juan, Puerto Rico, January 19, 1959.

(s) LUIS R. POZO
Judge

Appendix D

JUDGMENT

San Juan, Puerto Rico, February 26, 1962

On the grounds set forth in the preceding opinion, the judgment rendered by the Superior Court, San Juan Part, on January 19, 1959, is hereby reversed, and the case is remanded for further proceedings.

It was so ordered by the Court as witnesses the signature of the Chief Justice.

(s) LUIS NEGRÓN-FERNANDEZ
Chief Justice

Attest: (s) IGNACIO RIVERA
Secretary

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 965

ANTONIO MARQUES-ARBONA,
PETITIONER,

v.

SECRETARY OF THE TREASURY
OF PUERTO RICO,
RESPONDENT.

BRIEF FOR RESPONDENT IN OPPOSITION

J. B. FERNANDEZ BADILLO
Solicitor General for the Commonwealth of Puerto Rico
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Blanchard Printing Company, Boston, Mass. — Law Printers

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ANTONIO MARQUES ARBONA,
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v.

SECRETARY OF THE TREASURY
OF PUERTO RICO,
RESPONDENT.

BRIEF FOR RESPONDENT IN OPPOSITION

To The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

COUNTER STATEMENT OF QUESTION

Whether under section 60 of the 1924 Income Tax Act of Puerto Rico, 13 L.P.R.A. sec. 778, a waiver of the assessment and collection of taxes due under a return made for an alleged calendar year applies to that calendar year, or if the taxpayer is in reality on the fiscal year basis, to the fiscal year ending in the calendar year named in the waiver.

OPINION BELOW

A translation of the opinion of the Superior Court of Puerto Rico appears printed as Appendix A of the petition at pages 16-26.

A translated copy of the opinion of the Supreme Court of Puerto Rico, which is not yet officially reported, appears printed as Appendix B of the petition at pages 27-32.

LACK OF JURISDICTION

This Hon. Court has no jurisdiction to entertain the instant petition under 28 U.S.C. sec. 1258, since it does not appear alleged, in same, expressly or by necessary implication, any of the situations therein expressly and specifically stated. See sub-sec. (3), wherein is required that the validity of a treaty or statute of the United States be drawn in question, or that the validity of a statute of the Commonwealth of Puerto Rico be at issue on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or that any title, right, privilege, or immunity be specially set up or claimed under the Constitution, treaties, or statutes of, or commission held, or authority exercised under the United States.

Jurisdiction in cases of review of a state court by this Honorable Court is limited to specific instances of denials of federal rights and only in cases strictly within the terms of the statute granting the power to do so. *Gonman v. Washington University*, 316 U.S. 98 (1942); *Waters Pierce Oil Co. v. Texas*, 212 U.S. 86 (1909).

The only issues involved in the instant case is the interpretation of a local statute by the Supreme Court of Puerto Rico, and the Supreme Court of the United States does not re-examine the local law as applied by local courts. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950).

STATUTES INVOLVED

The pertinent statutes are the following:

28 U. S. C., Sec. 1258
Act No. 74 of 1924, as amended by Act No. 31 of 1941 (13 L.P.R.A. 778).

COUNTER STATEMENT OF THE CASE

The petitioner, in determining his taxable income for each of the years herein involved used a twelve-months period beginning July 1 and ending June 30 of the following year.

Notwithstanding the fact that he had to pay taxes on the basis of said fiscal period ending June 30, he filed his returns stating in the heading of same that they covered the calendar year ending December 31, although those returns included no operations or income of the six months period immediately preceding December 31. Moreover he filed said returns on March 15 of the respective subsequent year instead of on September 15 of the same year in which each fiscal year ended, as required by law.

Pending investigation, and before the expiration of the statute of limitations, petitioner signed, at the request of respondent, waivers of the prescription and assessment of any income taxes due for each year herein at issue. In each of said waivers respondent typed December 31 as the date on which the taxable period covered ended, and December 31, 1954 as the expiration date of the extension agreed for the assessment of any deficiency. (Petition—Appendix A page 22).

The deficiencies were notified by respondent to petitioner on August 17, 1954. (Petition—Appendix A—page 16).

The taxpayer filed suit in the Superior Court of Puerto

Rico challenging said deficiencies, alleging that the above mentioned waivers were ineffective since they referred to calendar years ending December 31 and the deficiencies notified had been determined on the basis of fiscal years ending June 30. (Petition—Appendix B—page 28).

The Superior Court of Puerto Rico originally decided the issue of prescription against petitioner. (Petition—Appendix A—pages 16-26).

The Supreme Court of Puerto Rico reversed the judgment rendered by the Superior Court in favor of petitioner on the issue of prescription, and upheld also the penalties assessed. (Petition—Appendix B—pages 27-32).

ONLY QUESTION PRESENTED

As hereinbefore stated the only question presented by the taxpayer in the courts below, and in the above petition, refers to the effectiveness of the above mentioned waivers, since the right of respondent to assess and collect the deficiencies herein involved depends on that issue.

The pertinent facts and the applicable law and cases are clearly stated in the opinion of the Supreme Court of Puerto Rico (Petition—Appendix B) and we fail to find any justification to indulge in any further discussion of same.

The taxpayer, after stating the reasons on which he requests the granting of the writ, alleges at page 11 of his petition, the following:

> "Under these circumstances there are two issues: (1) Could the Secretary of the Treasury, respondent herein, change petitioner's system of filing his returns to December 31 and notify him with a deficiency on the basis of a different year, in violation of the period specified in the waiver of prescription authorizing him to investigate only petitioner's calendar years?" And

(2). Could the Secretary of the Treasury, respondent herein, utilize semesters corresponding to years that had definitively prescribed in order to compose therewith a fiscal year and assess a deficiency, as well as interest, surcharges, and fines for a delay in filing the return, when such delay was caused by respondent in connection with the petitioner?"

He seems to fail to distinguish, as to the first one of said statements, that the controlling fact is not the date stated in the heading of the return filed by him as covering a calendar year ending December 31, but the fact that in reality he determined his taxable income on the fiscal year basis ending June 30, since what respondent did was to disregard the fiction and act on the basis of what petitioner did in reality. Likewise, as to the second statement, he seems to consider that a taxable year consists of two separate and independent semesters for the purpose of determining taxable income, and that one semester of any fiscal year may be severed and tacked to the second semester of the immediately subsequent calendar year. (13 I.P.R.A. 771(a)(1)).

The delay in filing the returns was due to the fault of petitioner, since he ignored the real facts and the law.

The cases cited by petitioner are not applicable to the issue involved. In *Commissioner of Internal Revenue v. Leasing & Building Co.*, 46 F.2d 2 (1931) the returns were filed upon the basis that the taxpayer's annual accounting period was in reality the calendar year, and the commissioner determined that they should have been filed on the fiscal year basis. The waiver referred to the calendar year. In said case the decision of the Board of Tax Appeals, 16 B.T.A. 105 (1929), was affirmed. The issue in *Mabel Elevator Co.*, 2 B.T.A. 517 (1925) was whether the filing of an amended return extended the term for assessment of the

tax. The Commissioner insisted that the return should have been filed on the calendar year and not on the fiscal year basis. No waiver was involved.

PRAYER

WHEREFORE, respondent prays that the petition for a writ of certiorari be denied.

J. B. FERNANDEZ BADILLO
Solicitor General for the
Commonwealth of Puerto Rico
JUAN A. FARIA
Assistant Solicitor General
Department of Justice
San Juan, Puerto Rico